No. 89-393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HARRY P. BEGIER, JR., TRUSTEE,

Petitioner,

— v. —

UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether a debtor's pre-petition payment of funds from its general operating account for trust fund tax obligations excludes that property from the bankruptcy estate subject to avoidance as preferential transfers under §547 of the Bankruptcy Code?

LIST OF PARTIES TO THIS PROCEEDING

Your Petitioner in the instant proceeding is Harry P. Begier, Jr., the duly appointed Chapter 11 Bankruptcy Trustee in the Bankruptcy matter of American International Airways, Inc.[1] which proceeding was originally commenced in the United States Bankruptcy Court for the Eastern District of Pennsylvania under Case Number 84-02379K on July 19, 1984. The Respondent in this proceeding is the United States of America Internal Revenue Service.

1. American International Airways, Inc. is a wholly owned subsidiary of AIA Industries, Inc., both entities of which filed bankruptcy proceedings under Chapter 11 in July of 1984. AIA Industries, Inc. Bankruptcy was filed on July 23, 1984 under Case Number 84-02411.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OFFICIAL CITATION TO DECISIONS BELOW

Harry P. Begier, Jr., Trustee v. United States of America, Internal Revenue Service, Appellant, 878 F.2d 762 (3rd Cir. June 30 1989, *as amended* July 13, 1989, *rehearing denied* July 28, 1989), 38 U.S.L.W. 2032, 89-2 U.S.T.C. Page 9416. The Oral Opinion of the District Court is unreported but appears beginning at Page A-22 of the Petitioner's Appendix to the Petition for Writ of Certiorari. The Opinion of the Bankruptcy Court is reported at 83 B.R. 324 (Bkrtcy. E.D. Pa 1987) and also appears in the Appendix to the Petition for Writ of Certiorari beginning at Page A-27.

STATEMENT OF JURISDICTION

Your Petitioner appeals from the Opinion and Order of the United States Court of Appeals for the Third Circuit filed on June 30, 1989 and as amended on July 13, 1989. A Petition for Rehearing pursuant to Federal Rule of Appellate Procedure 40(a) and Suggestion for Rehearing en banc was denied by the Third Circuit by Order dated July 28, 1989.

Original jurisdiction for the proceeding in the Bankruptcy Court was founded on 28 U.S.C. Section 1334(b) and 28 U.S.C. Section 157(b)(2)(F). Appellate review by the District Court was based on 28 U.S.C. Section 158(a) and by the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. Section 158(d) and Section 1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) based on this Court's granting a Petition for Certiorari on January 8, 1990. *Begier v. United States of America Internal Revenue Service*,____U.S.____, 110 S.Ct. 714 (1990).

STATUTES AT ISSUE

Section 547 PREFERENCES

(a) In this Section –

* * *

(4) a debt for a tax is incurred on the day when such tax is last payable, including any extension, without penalty.

(b) except as provided in Subsection (c) of this Section, the Trustee may avoid any transfer of property of the Debtor–

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the Debtor before such transfer was made;

(3) made while the Debtor was insolvent;

(4) made–

(a) on or within ninety (90) days before the date of filing the Petition; or

(b) between ninety days and one year before the date of filing of the Petition, if such creditor at the time of such transfer–

(i) was an insider; and

(ii) had reasonable cause to believe the Debtor was insolvent at the time of such transfer; and

(5) that enables such creditor to receive more than such creditor would receive if–

(a) the case were a case under Chapter 7 of this title;

(b) the transfer had not been made; and

(c) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. Section 547(b) (1982).[2]

Section 541 PROPERTY OF THE ESTATE

(a) The commencement of a case under Section 310, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

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2. As noted by the Court of Appeals in their decision in the instant case, 11 U.S.C. Section 547(b) was amended in 1984, although the earlier version as originally enacted is applicable to this case. Public Law No. 98-353, Title III, Sections 310, 462 July 10, 1984, 98 Stat. 355, 378 was made applicable only to cases commenced ninety days following enactment. Since this case was filed on July 19, 1984, the 1982 provisions of the Bankruptcy Code applies. *Begier v. United States*, 872 F.2d 762, 765 (3rd. Cir. 1989) (Appearing at Page 6 of Official Opinion.)

(7) Any interest in property that the estate acquires after the commencement of the case.

* * *

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. Section 541. (1982)

SECTION 7501. LIABILITY FOR TAXES WITHHELD OR COLLECTED.

(a) General rule.

Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

26 U.S.C. Section 7501 (1984).

STATEMENT OF CASE

Your Petitioner has requested that this Court review a Decision rendered by the United States Court of Appeals for the Third Circuit which reversed a Decision of the United States District Court affirming a Final Order of the United States Bankruptcy Court. The Petitioner herein is the Court appointed

Chapter 11 Bankruptcy Trustee in the matter of American International Airways, Inc., which proceeding is pending in the United States Bankruptcy Court for the Eastern District of Pennsylvania.[3] The original action at issue before this Court was commenced by the Trustee seeking to avoid four payments made during the ninety (90) days preceding the bankruptcy filing by the Debtor Corporation, hereinafter referred to as "Debtor" to the Internal Revenue Service, hereinafter referred to as "IRS" as preferential transfers pursuant to 11 U.S.C. Section 547 (b).

The facts critical to the matter were never in dispute and were largely established before the Bankruptcy Court by a Stipulation of facts submitted by the parties and made a part of the record at trial.[4] Additionally, the Bankruptcy Court made specific findings of fact which were expressly incorporated in the Bankruptcy Court Opinion.[5]

The Debtor was a commercial airline that provided passenger and air cargo service to the Eastern and Central United States. (J.A.p.A-21). As a regular employer of individual taxpayers, the Debtor was required to withhold and pay on a quarterly basis certain employment taxes, specifically the employee's share of withholding taxes and the employee's share of Federal Insurance Compensation Act taxes. (J.A.p.A-29-31). The Debtor was also required to pay the employer's share of the FICA assessment. Additionally, as an airline carrier, the Debtor was subject to certain Federal Excise taxes collected from airline passengers. These taxes were all required to be paid by the Debtor to the IRS. (J.A.P.A-30).

By the first quarter of 1984, the Debtor had become delinquent in the filing and the payment of its Social Security,

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3. A Chapter 11 Liquidating Plan has been confirmed by the Bankruptcy Court by Order dated November 3, 1988. Under the Plan the Trustee is responsible to liquidate all assets of the estate, including the claim involved in this suit.

4. A copy of the Stipulation admitted into the record before the Bankruptcy Court (J.A.p.A-21) and was duplicated in the Appendix to the Writ of Certiorari beginning at Page A-46.

5. *Begier v. IRS*, 83 B.R., 324, 326-7 (Bkrtcy. E.D. Pa. 1987).

Federal Income and Excise taxes in an amount which approximated One Million Five Hundred Thousand Dollars ($1,500,000). (J.A. P.A-44) As a direct result of the poor filing and payment history of the Debtor, including its inability to make timely tax deposits of withholding obligations, the IRS issued a notice pursuant to 26 U.S.C. Section 7512 requiring the debtor to file its employer tax return on a monthly basis. The IRS further required the Debtor to establish a special account for future deposit of all tax obligations. These notices were delivered by mail on February 22, 1984 and personally served upon a principal of the Debtor on March 1, 1984. (J.A. P.A-24,39).

In response to the notices, the Debtor established a specially designated tax account on March 6, 1984 and deposited sums therein on March 22, March 30, April 13, and April 17, 1984 totalling Six Hundred Ninety-Five Thousand Fifty-One Dollars and Forty Two Cents ($695,051.42). (J.A. P.A-35) From this designated account, the Debtor on April 30, 1984 transferred Six Hundred Ninety-Five Thousand Dollars ($695,000) directly to the IRS. (J.A. P.A-22,35) This payment was accompanied by a check from the Debtor's general operating account in the amount of Seven Hundred Thirty-Four Thousand Seven Hundred Ninety-Seven Dollars ($734,797). These payments were transmitted with a letter from the Debtor specifically directing the application of the monies to varying tax obligations for specific periods. (J.A. P.A-33). The application of these monies as directed by the Debtor was subsequently confirmed by the Revenue Officer of the IRS responsible for the delinquent entity. (J.A. P.A-48).

Additional transfers were paid out of the Debtor's general operating account by check dated June 22, 1984 in the amount of Two Hundred Thousand Dollars ($200,000) and then subsequently by check dated June 24, 1984 in the amount of Eleven Thousand Six Hundred Thirty-Six Dollars and thirty five cents ($11,636.35). (J.A. P.A-23,37). On each subsequent occasion the delivery of the payments was accompanied with a specific direction from the Debtor designating the application of the payment to specific taxes due. (J.A. P.A-43).

As a result of continuing financial problems, the Corporation was required to file for bankruptcy relief under Chapter 11 of Title 11 of the United States Code on July 19, 1984. 11 U.S.C. §1101 *et seq.* (1982). In the early stages of the bankruptcy the debtor remained in business as a debtor-in-possession. The Debtor, however, was unable to operate profitably in the bankruptcy whereby, your Petitioner herein was appointed by the Bankruptcy Court on September 19, 1984 to serve as the Chapter 11 Trustee. *Begier v. IRS*, 83 B.R. at 325 (citing to a previous decision in the same bankruptcy). *See In re American International Airways, Inc.*, 74 B.R. 691, 692-3 (Bkrtcy. E.D. Pa. 1987).

The Trustee, during the administration of the bankruptcy proceeding, instituted this action against the Internal Revenue Service seeking to avoid the three transfers from the Debtor's general operating account as preferential payments under §547 of the Bankruptcy Code.[6] Following a trial on the merits and in full consideration of the Stipulation the parties submitted previously thereto, the Bankruptcy Court found the Trustee entitled to avoid Seven Hundred Thousand, Four Hundred Ten Dollars ($700,410) as preferential transfers made by the Debtor to the IRS. *Begier v. United States Internal Revenue Service*, 83 B.R. 324, 333 (Bkrtcy. E.D. Pa. 1988).

Based on the facts as stipulated, the IRS acknowledged before the Bankruptcy Court that the Trustee had established the requisite elements for avoidability under 547(b). The IRS unsuccessfully argued, however, that the three transfers at issue should be excepted from avoidance pursuant to a certain affirmative defense included in the statute under Section 547(c)(2). The Bankruptcy Court ruled that the IRS failed to carry its affirmative burden in establishing each element of the defense

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6. The original complaint alleged as preferences only the three transfers from the debtor's general operating account. (J.A. P.A-14). In order to contest certain affirmative defenses raised by IRS, the complaint, by stipulation, was amended to include the fourth transfer of $695,000 from the specially designated trust account. Petitioner never suggested this specific transfer was avoidable. (App. to Petition for Writ of Certiorari P. A-46).

and granted judgment in favor of the Trustee. *Id.* at 328, 333. The Bankruptcy Court decision was affirmed by the District Court in an unreported decision. *Begier v. United States Internal Revenue Service,* No. 88-3529 (E.D. Pa. August 15, 1988) (Donald W. VanArtsdalen, J.).

On Appeal to the Third Circuit Court of Appeals, the IRS changed its tactics. The Government relinquished its argument regarding the affirmative defense and instead pursued an issue which originally was summarily rejected by the Bankruptcy Court. The IRS argued, by operation of law, a statutory trust imposed under the Internal Revenue Code in Section 7501 should take precedent over the Bankruptcy Code whereby any payment for the trust fund portion of withholding taxes to the government, regardless of the source, removed the property from being considered part of the Debtor's estate thereby precluding avoidability.[7]

The Third Circuit approached this issue the same as have several Courts who have had an opportunity to address the argument. The Court found the terms included in the preference statute to be lacking clear directive and therefore looked to the legislative history for the Congressional intent behind the statute. *Begier v. United States,* 878 F.2d 762, 766 (3rd Cir. 1989) (Cert. App. P. A-9). The majority Opinion of The Third Circuit adopted the rationale set forth by the dissenting Opinion of the Honorable Ruth Ginsburg in *Drabkin v. District of Columbia* 824 F.2d 1102 (D.C. Cir. 1987). *Id.* at P. 771 (Cert.

7. Section 547(b) of the Bankruptcy Code requires that a Trustee may only avoid transfers which are the property of the debtor. 11 U.S.C. Section 547(b)(1982). As noted in the Third Circuit's Opinion "the Bankruptcy Code does not define the phrase "property of the debtor" found in §547(b). Therefore, courts have looked to whether the transferred property may be defined as "property of the estate" under §541. Indeed, to constitute a preference under §547(b), a transfer must deprive the debtor's estate of property that could otherwise be used to satisfy creditors. *In re Newcomb,* 744 F.2d 621, 626 (8th Cir. 1984); *see also* 4 *Colliers on Bankruptcy* Paragraph 547.03[2] (1989) ("A transfer is preferential only if the property or the interest in property transferred belongs to the debtor . . . The fundamental inquiry is whether the transfer diminished or depleted the debtor's estate")." *Begier, supra.* 878 F.2d at 769. (Footnote 13).

App. P. A-19) The majority concluded that certain wording in the legislative history mandated special treatment for withholding taxes. While the Court acknowledged that the Internal Revenue Service would not be able to sidestep the Trustee's power to avoid non-trust fund payments such as corporate income taxes, federal unemployment taxes or the employer's share of FICA taxes, it found the ability of the Debtor to make a pre-petition payment on account of withholding taxes, regardless of the source of the funds used to make the payment, impressed with trust characteristics removing the property from the Debtor's estate. *Begier v. United States,* 878 FD.2d 762, 763, 771 (3rd Cir. 1989).

The Third Circuit thereon directed the instant case be remanded to the District Court for findings consistent with the Court's ruling. Upon the entry of the Order, your Petitioner timely filed a Petition for Rehearing pursuant to Federal Rule of Appellate Procedure 40(a) and a Suggestion for Rehearing *en Banc* pursuant to Federal Rule of Appellate Procedure 35(a). Both the Petition for Rehearing and Rehearing *en Banc* were denied by the Court by Order dated July 28, 1989. A Petition for Writ of Certiorari was timely filed with this Court, whereon January 8, 1990 the Petition was granted. *Begier v. United States,* ____U.S.____, 110 S. Ct. 714, (1990).

SUMMARY OF ARGUMENT

Your Petitioner is a Trustee in bankruptcy which sought to avoid three transfers from a debtor's general operating account to the IRS in satisfaction of outstanding trust fund taxes as voidable preferences under §547(b) of the Bankruptcy Code. The IRS argues that the payments are not voidable because monies paid to the IRS are covered by a statutory trust under 26 U.S.C. §7501 which effectively removes these payments from being considered property of the estate. A panel of the United States Court of Appeals for the Third Circuit, in a majority Opinion relied principally on statements originally set out in the Dissenting Opinion by the Honorable Ruth B. Ginsburg in the case of *Drabkin v. District of Columbia,* 824 F.2d 1102,

1117-1120 (D.C. Cir. 1987) in concluding that the transfers at issue were subject to a trust thereby precluding avoidability. Based on the arguments summarized below, the Third Circuit holding is incorrect and should be reversed.

The basis for reversal is fourfold. First, the Court below relies on the wrong Legislative History to the statute as actually enacted. The Legislative History expressly referred to in both the Majority Opinion by the Third Circuit and the Dissenting Opinion in Drabkin explained a section of a proposed statute which was never enacted by Congress. The specific sections which the cited History referred were expressly omitted from the amended legislation as finally enacted. Reliance on this Legislative History, which is the cornerstone to the Majority's holding, is without merit.

Secondly, the Majority fails to consider critical facts of record before the Trial Court. The Majority presumes the monies subjected to the alleged trust were collected and withheld from employees' wages. The record, however, reflects that no monies were withheld. The statute relied upon to establish a trust, 26 U.S.C. §7501 is written in the past tense, imposing the trust on funds actually collected and withheld. The failure to pay the monies into an established tax depository bars the creation of the trust mandated by §7501 because the physical act, collection and withholding, was never accomplished. This rationale has recently been approved by a third Circuit Court to address the exact issue. *United States v. Daniel,* 887 F.2d 981 (9th Cir. 1989).

The holding by the Majority Panel is also contrary to prior principles established by this Court. Previously, this Court ruled that for a trust under §7501 to exist, the IRS must trace funds to the perceived trust. *United States v. Randall,* 401 U.S. 513, 91 S. Ct. 991 (1971). While Congress, in enacting the Bankruptcy Code of 1978, may have relaxed the tracing requirements to permit the use of reasonable assumptions when the IRS is unable to strictly trace funds into a trust, the statute as enacted and the Legislative History is silent as to any effect on pre-petition payments. The majority suggests this silence represents Congressional intent to preclude the necessity of the IRS

tracing to establish the existence of pre-petition trusts. Such logic is nonsensical. The principles preserved by this Court's Opinion in *Randall* and its progeny regarding the establishment of trust under §7501 of the Internal Revenue Code are equally applicable for the avoidance of pre-petition transfers.

Finally, the holding of the Third Circuit is contrary to the established principles of the Bankruptcy Code including its ability to assure equality of distribution to all creditors similarly situated. The preference statute under the Code is a vehicle to preserve and enforce those bankruptcy principles. The Majority's ruling emasculates those principles by granting to the IRS a preferred status not expressed in the plain wording of the statute. For these reasons, the Third Circuit holding must be reversed.

ARGUMENT

PAYMENTS TO THE INTERNAL REVENUE SERVICE FROM THE GENERAL OPERATING ACCOUNT OF A DEBTOR OVER WHICH DISBURSEMENTS THE DEBTOR HAD CONTROL AND WHICH FUNDS WERE NOT WITHHELD FROM EMPLOYEE WAGES ARE TRANSFERS OF PROPERTY OF THE DEBTOR AVOIDABLE UNDER 11 U.S.C. §547(b) AND NOT IMPRESSED WITH A TRUST PURSUANT TO 26 U.S.C. §7501.

This case presents for this Court's review the issue of whether a trustee in bankruptcy may avoid as preferential transfers pursuant to 11 U.S.C. §547(b) monies paid on account of trust fund taxes to the IRS prior to the filing of the bankruptcy proceeding. The IRS successfully argued before a Third Circuit Panel that 26 U.S.C. §7501 (1984) of the Internal Revenue Code impresses any monies paid prior to the bankruptcy filing with a trust which, solely by operation of law, removes this money from being considered property of a bankrupt estate subject to avoidance. The Majority agreed with the IRS argument, reversed the decisions of the District Court and the Bankruptcy Court and relied predominantly on the rationale originally set forth in the Dissenting Opinion by the United States Court of

Appeals for the D.C. Circuit in *Drabkin v. District of Columbia. Drabkin, supra.*

It is respectfully presented that the Majority Opinion written by Judge Scirica for the Third Circuit and the theories espoused by Judge Ruth Ginsburg in her Dissent in *Drabkin* are legally incorrect. The Third Circuit errs in its recitation of the law. Judge Scirica's conclusions are based on legislative history which addressed a proposed statute not enacted, presumes facts that do not appear in the record and fails to give clear interpretation to the plain meaning of both §547 of the Bankruptcy Code and §7501 of the Internal Revenue Code. The Circuit Court's holding incorrectly distinguishes the effect of prior rulings of this Court whose legal principles should be applicable to the case at bar. This Brief will analyze each of these points and respectfully request, based on these errors in the interpretation of the law, that this Court reverse the Decision of the United States Court of Appeals for the Third Circuit.

A. The Decision of the Court of Appeals for the Third Circuit is Based on Legislative History of a Proposed Statute Not Enacted by Congress.

Several Courts have attempted to interpret whether Congress intended, when enacting the Bankruptcy Code, to permit a bankruptcy trustee to avoid pre-petition transfers on account of taxes paid to a governmental authority which if properly withheld would be covered by a statutory trust.[8] Each of the Courts,

8. In addition to the diametrically opposed conclusions of the D.C. Circuit in *Drabkin, supra.* and the Third Circuit in *Begier, supra.*, the Ninth Circuit in the case of *United States v. Daniel*, 887 F.2d 981 (9th Cir. 1989) has entered the arena to tip the Circuit scales in favor of reversal. The Third Circuit acknowledged the separate views of varying Bankruptcy Courts. *Begier, supra.* at 767 citing to *In re: Rodriquez*, 50 B.R. 576 (Bkrtcy. E.D. NY 1985) and *In re: Razorback Ready-Mix Concrete Company*, 45 B.R. 917 (Bkrtcy. E.D. Ark 1984) with *In re: Olympic Foundry Company*, 63 B.R. 324 (Bkrtcy. W.D. Wash 1986), rev'd on other grounds, 71 B.R. 216 (9th Cir. BAP 1987) and *In re: Miller's Auto Supplies, Inc.*, 75 B.R. 676, 679-81 (Bkrtcy E.D. Pa 1987). The majority in *Drabkin, supra.* at 1110 carefully recognized the divergent views of the Bankruptcy Courts. *See*, in particular Footnotes 27 and 28 in *Drabkin, Id.*

however, have concluded that the statute on its face does not provide clear direction to resolve the issue whereby they have referred, at least in part, to the legislative history supporting the enactment of the Bankruptcy Reform Act of 1978 for guidance.[9]

In the case before this Court, the Third Circuit followed the same procedure. The Court cited to the legislative history to support its conclusion that a pre-petition payment may not be avoided in light of the protections afforded the Internal Revenue Service under 26 U.S.C. §7501. The Majority quoted excerpts from the Senate Report of July 14, 1978 and the House Report issued September 8, 1977 to support its conclusion of what Congress intended by the statute. *Begier,* 878 F.2d at 767 (*citing to* H.R. Rep. No. 595, 95th Cong. 1st session 373 reprinted in 1978 U.S. Code Cong and Administrative News 5787, 6329. The Third Circuit majority also acknowledged the identical issue was squarely addressed by the D.C. Circuit in *Drabkin, supra., Id.* The Third Circuit noted the Dissent in *Drabkin* relied on the exact provision of the House Report which it reprinted at length, in its own Opinion. *Begier, supra.* at 768 citing to *Drabkin,* 824 F.2d at 1117 (Ruth B. Ginsburg, J. Dissenting)[10]. The Court believed the portion of the House Report to express the intent of Congress to preclude the avoidability of tax withholding payments.

While acknowledging that the Majority in *Drabkin* attempted to discount this passage by referring to other language in the House Report, the Third Circuit concluded, as did the Dissent in *Drabkin,* that the fact that a party is able to make the

9. Act of November 6, 1978, Pub. L. No. 95-598, 92 Stat. 2549, hereinafter referred to as the Bankruptcy Code or The Bankruptcy Reform Act of 1978.

10. The segment from the House Report as quoted read:

> A payment of withholding taxes constitutes a payment of money held in trust under Internal Revenue Code §7501(a) and thus will not be a preference because of the beneficiary of the trust, the taxing authority, is in a separate class with respect to those taxes, if they have been properly held for payment, as they will have been if the debtor is able to make the payment.

1978 U.S. Code and Administrative News at 6329.

payment alone is sufficient to establish the trust under 26 U.S.C. §7501. Judge Ruth Ginsburg noted that "while the Report might have been phrased more mellifluously, what it sought to convey comes across without static: if the debtor is able to make the payment, the taxes 'have been properly held for payment,' which places the trust beneficiary in a class separate from other creditors and thus removes this payment from the category of preferences voidable by the trustee." *Drabkin, supra.* at P. 1118.

The problem with this approach adopted by both the Third Circuit and Judge Ginsburg in Dissent of *Drabkin* is the language contained in the House Report to House Resolution 8200 as quoted and relied upon by both Courts referred to a prior draft of proposed legislation rather than the Bankruptcy Code as finally enacted by Congress. As recognized by Judge Douglas Ginsburg in writing for the Majority in *Drabkin,* the ultimate wording of the Bankruptcy Reform Act for §541 and §547 represented a compromise between competing pieces of legislation introduced in the House of Representatives and the Senate. *Drabkin,* 824 F.2d at 1106. The Court carefully traced the Legislative revisions through different drafts of the statute.

In its earlier drafts, the House sponsored legislation afforded no special treatment to either withheld taxes or to pre-petition tax payments, but as the accompanying House Report indicated, these general provisions would have nonetheless protected the interest of taxing authorities. *Drabkin, supra.* at 1107. As further analyzed by Judge Douglas Ginsburg:

> The House Bill was then sent to the Senate, which had been drafting its own legislation (footnote omitted). Instead of simply amending House Resolution 8200 to conform to that legislation, the Senate passed its own bill (S. 2266) and substituted it for the House version. Unlike the House, the Senate specifically protected taxing authorities. Section 541(b)(3) of the Senate Bill would have excluded from the debtor's estate any "taxes withheld or collected from others

> pursuant to federal, state, or local law before the commencement of a case and required to be paid to a government unit."

Drabkin, supra. at p. 1108.

Specifically, as Judge Drabkin further noted the bill as then proposed by the Senate contained the express provision that:

> The Trustee may avoid any transfer of property of the debtor . . . for or on account of an antecedent debt, other than a debt which payment is required under the revenue laws of a government unit owed by the debtor before such transfer was made.

Drabkin, supra. at Page 1108.[11]

The legislation was then sent back to the House for consideration. The House did not approve of the Senate's proposed changes. The Senate insisted on its own version of the proposed legislation and requested a conference with the House. *Klee, Legislative History of the New Bankruptcy Law,* 28 DePaul L. Rev. 941, 953 (1979). Because of the lateness of the conference request in the legislative term, proponents of each version of the legislation met and agreed to resolve the differences between the two versions of the bill without a formal conference.[12] Intensive negotiations ensued. Klee, *supra.* at

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11. Judge Douglas Ginsburg actually provides a simplified analysis of the legislative history to the Bankruptcy Reform Act. Kenneth N. Klee provides a scholarly analysis of the legislative history behind the eventual enactment of the Bankruptcy Code including a careful examination of the political jousting which occurred to assure the passage of the major legislation during the waning hours of the 95th Congress. Klee, *Legislative History of the New Bankruptcy Law*, 28 DePaul L. Rev. Page 941 (1979). As noted by Judge Ginsburg in a footnote to the Majority Opinion, the House and Senate Committee Leaders took turns amending the legislation rather than sending their separate bills to a Conference Committee, *Drabkin, supra.*, P. 1108, footnote 20, referring to 124 Cong. Rec. 32392 (Sept. 28, 1978) (statement of Representative Edwards); 124 Cong. Rec. 33990 (Oct. 5, 1978) (statement of Senator DeConcini).

12. Klee, *Legislative History*, 28 DePaul L. Rev. at 954. Citing to 124 Cong. Rec. H 11,089 (daily ed. Sept. 28, 1978) (Remarks of Rep. Edwards). As Klee notes there were substantial disputes between the two versions. The principal differences involved the status of the Court and administrative

954-7. A compromise bill was eventually worked out by the Senate and House Floor Managers.

In the final amendments, substantial changes were made to the preference section as it pertained to the avoidability of taxes. The Managers adopted the House versions of §541 and §547 rejecting the alternative language contained in the Senate Bill. *Drabkin, supra.* The Managers also added a new subsection, §547(a)(4) which established when a debt for a tax is incurred.[13]

A Joint Explanatory Statement was issued with the compromised Legislation, given by Senator DeConcini and Representative Edwards before their respective bodies. As Judge Ginsburg for the Drabkin Majority noted, these Joint Statements clearly reflected that the language precluding avoidability of tax withholding payments as contained in the former Senate Bill was expressly not enacted. *Id.* This point is further evidenced by the amendment's change to contrary language in the earlier House and Senate Reports so that it was clearly indicated that the government would be subject to avoidance of preferential transfers and that 11 U.S.C. §106(c) (the sovereign immunity protections) would not apply. *Drabkin, supra.* at P. 1109.

The critical effect, however, of the compromise legislation is that the portion of the House Report expressly relied upon by the Third Circuit and Judge Ginsburg in Dissent in Drabkin referred to language in a proposed statute that was expressly

NOTES *(Continued)*

systems, being whether the Bankruptcy Courts should be Article III Courts or as adjuncts to the United States District Courts. There were significant differences in substantive law as well, including issues such as exemptions, reaffirmation and the treatment of public companies in reoganization cases. *Klee, id.* at 953. As Kenneth Klee recounts, the revised Bankruptcy Code was ten years in the offing, endured hundreds of amendments, received comments for many legal scholars through Congressional solicitation, was rewritten and revised on countless occasions, only to be subjected to the legislative crunch at the end of the 95th Congress. Without its adoption in the then current term, the process would have to begun anew in the 96th Congress in 1979. Klee, *Id.*

13. In the definition section, the Managers added a fourth definition. The subsection provided that "(4) A debt for a tax is incurred on the day when such tax is last payable, including any extension, without penalty." 11 U.S.C. §547(a)(4) (1982).

omitted from the final bill. Reliance on this language which is the cornerstone to the Majority's holding below is without merit. Congress simply did not intend what the Majority in *Begier* suggests. The Courts by referring to the wrong Legislative History support an invisible statute. The language which was referenced does not appear in the final enacted text of §547.[14]

B. Where the Plain Language of the Statute Permits a Conclusive Analysis, it is Unnecessary to Reply on Materials Outside the Statutory Text to Interpret the Statute.

Further argument against the Third Circuit's holding is evidenced from a plain reading of the Statutes at issue. This Court has favored giving plain meaning to statutory text. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S.____, 109 S. Ct. 1026, 1031 (1989). The judicial task is to interpret laws rather than reconstruct legislators' intentions. It must be assumed what Members of the House and Senators thought they were voting for, and what the President thought he was approving when he signed the Bill, was what the text plainly said, rather than what a few representatives, or a community reports said it said. *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413 (1988) (J. Scalia concurring in part). While there is no reason to proceed otherwise in this case the Third Circuit's holding does.

Section 547 of the Bankruptcy Code does not expressly preclude the avoidability of all tax payments. This is evidenced by the statute plainly describing when a tax is due in §547(a) and

14. The effect of the Majority and Judge Ginsburg's Dissent in *Drabkin* is to preclude the avoidability by a bankruptcy trustee of any pre-petition trust fund tax payment. The Court suggests no tracing is required. A logical extension of this proposition will cause an absurd result. Presume the situation of where a bank lends money to a corporation for the purchase of inventory or equipment and the funds are in turn paid to or seized pre-petition by the IRS. Certainly there is no connection to employees wages but the Majority would believe these funds, because the payment was made to the IRS, to be impressed with a statutory trust under 26 U.S.C. §7501 and thus immune from avoidability. Such an overreaching effect could not have been the intent of Congress.

further excepting from avoidance the fixing of a statutory lien in §547(c)(6). The IRS admits and the Third Circuit concurs that for certain taxes, avoidability of tax payments is possible. The Third Circuit noted its holding would not preclude the avoidability of non-trust fund taxes such as corporate income taxes, the employer's share of federal insurance contribution taxes and federal unemployment taxes. *Begier*, 878 F.2d at 771. The Third Circuit holds however that the statute does not permit the avoidance of trust fund taxes. *Begier, supra*. at Page 770. If this were true, why would not Congress have placed such an important provision in the statute?

As the Majority in *Drabkin, supra*. postulates, Congress was aware of the situation and in fact had included such language in the Senate Bill. *Drabkin*, 824 F.2d at Page 1108. The law as finally enacted, however, specifically omitted this preclusion. *Drabkin, supra*., at 109. The Majority's reliance on the Reports explaining the unenacted provision should not be used to resurrect words which have been buried. When the language of the law is clear, the Court should not replace it with unenacted intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421 107 S. Ct. 1207 (1987) (J. Scalia concurring). If Congress desired to restrict avoidance of pre-petition tax withholding payments, it could and should have expressly stated such in the statute as enacted. The fact that it considered this restriction, as evidenced by the proposed Senate legislation but intentionally omitted, such plain wording may only mean that they did not intend to preclude the avoidability of trust fund tax payments. The plain wording of §547 mandates a conclusion opposite that reached by the Third Circuit.

A similar argument may be made for interpreting §7501 of the Internal Revenue Code. The IRS argued before the Court below that §7501 of the Internal Revenue Code may be used to remove property from the estate by the creation of a statutory trust. The IRS suggests and the Majority of the Third Circuit by their holding ruled that this special treatment arises solely by operation of law. The holding suggests that no proof of the trust's existence need be established, at least in the pre-petition transfer situation. *Begier, supra.* The IRS argument and the

holding by the Court fails to two counts. First, it ignores the plain language of §7501 requiring that for the trust to be created, the act of withholding must have occurred. Secondly, it creates an unrealistic extrapolation from prior rulings of this Court interpreting the trust statute of the Internal Revenue Code.

A proper reading of 26 U.S.C. §7501 required that a trust is deemed to exist if the taxes were in fact segregated by the person requiring to collect the tax under various statutes. The section expressly provides:

> Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax *so collected or withheld* shall be held in a special fund in trust for the United States (emphasis added).

26 U.S.C. §7501(a)

The language is specifically written in the past tense, meaning the act of withholding must have occurred. *See United States v. Slodov*, 436 U.S. 238 98 S. Ct. 1778, 56 L. Ed. 2d 251 (1978). The Majority Opinion by the Third Circuit presumes the money subject to the trust statute was withheld. This is an erroneous factual conclusion by the Majority. The Court repeatedly refers to withheld taxes, but nowhere in the record established in the Bankruptcy Court was there evidence that the monies where in fact withheld. To the contrary, the record reflects the monies were not collected. The witness on behalf of IRS testified in the trial court that while the returns for taxes were timely filed, those returns clearly showed that no tax deposits were made. (J.A. P.A-39,40)[15]

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15. The Government's witness Alan Zlatkin testified that the debtor did not make the deposits (J.A.39,40). The record also established when this trust should have been created. George L. Miller, the trustee's accountant testified that based on the amount of wages paid by the debtor, the IRS regulations required this taxpayer to deposit monies withheld into a Federal Reserve Institution for an amount equal to the required withholding three days following end of the pay period. (J.A. P.A-29,30). *See*, 26 C.F.R. §31.6302-1. The IRS suggests that segregation of funds is not required under the Internal Revenue Code. (Brief of Appellant to Third Circuit at Page 9). Such a

In *United States v. Slodov*, this Court ruled that a trust under 26 U.S.C. §7501 cannot be impressed on after acquired funds. *United States v. Slodov, supra.* The Supreme Court found that "under §7501, there must be a nexus between the funds collected and the trust created. That construction is consistent with the accepted principle of trust law requiring tracing of misappropriated trust funds into the trustee's estate in order for an impressed trust to arise. See *Dobbs, Handbook on Law of Remedies*, 424-425 (1973). *Id.* As all too often happens when a debtor corporation begins its slide into bankruptcy, the trust res in the tax scenario is not created. The employer funds only the net payroll for the benefit of his employees. The tax obligations, both the employee and employer share, is then perceived to be a problem to be dealt with at a later date. No sums are funded to create the trust res whereby the physical act, "the amount so collected or withheld" as contemplated in 26 U.S.C. §7501, never occurs. It therefore follows that the trust never existed. An interest which has not existed cannot be held in trust. *Restatement of Trust*, Volume I §75. The statute, by its own terms does not impose a trust on funds "collected *or which should have been collected*." The Government's argument imputes this additional wording into the Statute.[16] If this wording

NOTES *(Continued)*

suggestion is completely contrary to the above referenced regulation. Unless the IRS is now suggesting that the regulations be disregarded, the procedures as described in the record should have been followed. In reliance on this record, the Bankruptcy Court concluded that no trust existed. *Begier v. United States Internal Revenue Service*, 83 B.R. at p.331.

16. Congress was cognizant of the employer taxpayer who fails to withhold income taxes from employee's wages. When enacting the priority section of the Bankruptcy Code (§507) the Court specifically considered giving a higher priority to employment taxes withheld or which should have been withheld than the priority given to an excise tax. See *In re Taylor Tobacco Enterprises, Inc.*, 106 B.R. 441, 442-4 (E.D. N.C. 1989). Of relevance here, the Court noted §507(a)(7)(c) granted a higher priority to taxes *required to be collected or withheld* (emphasis added) *id.* at 442. Nothing precluded Congress from placing the same language into §7501 of the Internal Revenue Code.

were what Congress truly intended, the language could have been expressly stated in the statute.[17]

The failure to pay these monies into the established tax depository as presented in the record below precludes the imposition of the trust which is mandated by §7501 because the act, collection and withholding, was never accomplished. No monies were taken from the employee's wages and deposited into the operating account. No trust res was ever created. The Majority simply failed to address this point.

C. The Decision of the Third Circuit is Contrary to the Established Principles Formerly Set Out by this Court.

The Third Circuit Majority also concludes that earlier rulings of this Court can be distinguished. The Third Circuit believed the ruling in *United States v. Randall*, 401 U.S. 513, 91 S.Ct. 991 (1971) and its progeny requiring a tracing by the IRS to establish the existence of a trust should apply only when the IRS is attempting to establish a trust on funds held by a debtor as of the commencement of the case. It is respectfully presented, however, that this unsupported rationale is incorrect. There is no reason why the principles preserved and protected by the *Randall* holding should not equally protect the same principles that exist under §547.

While this Court has never had the opportunity to address whether a Trustee in Bankruptcy may under Section 547(b) of

17. The District Court for the Southern District of Georgia, by District Judge Coolidge has adopted this theory. In an unreported opinion, the District Court distinguished *Randall*, discussed *infra*, acknowledging the required element to deposit taxes into a trust account. Judge Coolidge perceived significant point in *Randall* was that the taxes in fact were not deposited into a trust bank account, hence, no trust was actually created. In the case before his Honor, the withheld taxes were in fact deposited into a trust account which should then be impressed with the statutory provision as an explicit trust. *In re: Glynn Wholesale Building Materials, Inc.*, 1978 W.L. 1229 (S.D. Ga.), 78-1 U.S.T.C. Page 9469 (April 12, 1978). The act of withholding had been accomplished, thus the trust res had been created. In the case at bar the act of withholding was not accomplished, thus no trust exists.

the Bankruptcy Code avoid pre-petition payments to the Internal Revenue Service on account of federal withholding taxes, the court has had an opportunity to analyze portions of the issue in related circumstances. This Court has on no fewer than three occasions examined whether the imposition of a trust pursuant to Section 7501 of the Internal Revenue Code may remove property from a bankruptcy estate. In each case this Court found the imposition of the trust may not be used to remove the property from the debtor. The underlying rationale in these earlier cases should be applied to the case at bar.

In *United States v. Randall,* a case decided under the former Bankruptcy Act, this Court ruled that 26 U.S.C. Section 7501(a) could not be used to impress a trust upon funds held by a bankrupt debtor corporation subsequent to the filing of the bankruptcy petition. *United States v. Randall,* 401 U.S. 513, 91 S.Ct. 991 (1971). The Court found the statutory policy of subordinating taxes to the costs and expenses of administration would not be served by creating or enforcing trusts which eat up an estate leaving little or nothing for creditors and court officers whose goods and services create the assets. *Id.,* 401 U.S. at 516, 91 S.Ct. at 994. The Court ruled that the funds then in the possession of the Debtor could not be found as a trust in favor of the Federal government inasmuch as this claim must succumb to an "overriding statement of Federal policy on questions of priorities." *Id.,* 401 U.S. at 515 91 S.Ct. at 993.

A few years following *Randall,* this Court had another occasion to review 26 U.S.C. Section 7501 in the bankruptcy context. In *U.S. v. Slodov,* this Court ruled that a trust under 26 U.S.C. Section 7501 cannot be impressed on after acquired funds. *United States v. Slodov,* 436 U.S. 238, 98 S.Ct. 1778, 56 L.Ed. 2d. 251 (1978). This Court found that "under Section 7501 there must be nexus between the funds collected and the trust created. That construction is consistent with the accepted principal of trust law requiring tracing of misappropriated trust funds into the trustee's estate in order for an impressed trust to arise". *Slodov, Id.,* 436 U.S. at 256, 98 S.Ct. at 1790 citing to D. Dobbs, *Handbook on the Law of Remedies,* 424-425 (1973). *Randall* and *Slodov* have been cited repeatedly for requiring the

IRS to establish a nexus between the funds withheld from employee's paychecks and the monies held by the employer in order to establish the impressed trust. The failure of the taxing authority to trace this connection precludes the imposition of the trust.

In a case decided under the Bankruptcy Reform Act of 1978, this Court has further ruled that property of the estate includes property of the debtor that had been seized by the Internal Revenue Service prior to the filing of the bankruptcy petition. *United States v. Whiting Pools, Inc.,* 462 U.S. 198, 208-9, 103 S.Ct. 2309, 2315, 76 L.Ed. 2d. 515 (1983). The essence of this Court's ruling in *Whiting Pools* recognized that the taxing authority must protect its interest according to the Congressionally established bankruptcy procedures, rather than, in that case, by withholding seized property from a debtor's efforts to reorganize. *Id.,* 462 U.S. at 212, 103 S.Ct. at 2317.

The Third Circuit differentiated the previous rulings by this Court by emphasizing in its Opinion below that those cases decided under the Act involved transactions in which the IRS was seeking to obtain funds from a debtor post-petition. The Third Circuit believed Congress when enacting the 1978 Bankruptcy Code intended the tracing burden only be applied to funds held as of the commencement of the case. *Begier,* 878 F.2d at 771. This conclusion, however, fails to consider this Court's ruling in *Whiting Pools* which enabled a debtor to recover property which had been seized by the IRS prior to the filing of the petition. While *Whiting Pools* did not turn on the effect of 26 U.S.C. Section 7501, it did express this Court's opinion that the Internal Revenue Service should be treated no differently than any other creditor. To the extent they held a possessory interest, that interest was subjected to the priorities Congress imposed in preserving a bankrupt debtor's property.

The Third Circuit again indicated that it believed the reasoning of the Dissent by Judge Ruth Ginsburg to be more palatable. *Id.* The Dissent in *Drabkin* also distinguished *Randall* as requiring tracing only when a post petition avoidance was at issue. Both Courts referred once more to the Legislative History

which expressly mandated the use of reasonable assumptions should strict tracing not prove possible to determine whether funds in the possession of a debtor as of the commencement of a case were impressed with the trust. *Drabkin, supra.* at P. 1119 quoting 124 Cong. Rec. 32417 (Sept. 28, 1978) (Statement of Representative Edwards); 124 Cong. Rec. 34016-7 (October 5, 1978) (Statement of Senator DeConcini). There is nothing, however, in that same excerpt of the Legislative History which would offer the slightest suggestion that Congress intended its example to be preclusive of any other type of tracing.

In the *Drabkin* Dissent, her Honor questioned the logic professed by the Majority when reaching their conclusion. In an often cited metaphor, her Honor noted that "just as the day follows the night", the Majority's suggestion that the converse to a proposition may not always follow. *Drabkin, supra.* at P. 1119. To limit tracing to post petition transaction, however, her Honor is guilty of using the same faulty logic. Her Honor suggests that if Congress relaxed tracing to establish a trust in a post-petition fund, it may be concluded that Congress did not intend to permit tracing in the pre-petition avoidance scenario. The failure of Congress to hypothesize a pre-petition tracing example is not a legitimate basis to presume it intended to preclude such tracing. This Court's conclusions in *Randall* were not modified by the Bankruptcy Reform Act, they were implemented. The philosophical basis for the *Randall* Decision may be applied to requiring tracing of pre-petitions funds as well as post-petition.

This Court in *Randall* looked at the priorities expressed by Congress between the Bankruptcy Act and the Internal Revenue Code. The Court concluded that the Bankruptcy Act was an overriding statement of Federal policy on the question of priorities. *Randall, supra.* 401 U.S. at P. 516, 91 S.Ct. at 993. This Court noted the progressive legislative development in the Bankruptcy Code marked a decline in the grant of tax preferences to the United States and marked an ascending priority for costs and expenses of bankruptcy administration. *Id.*, 91 S.Ct. at

994.[18] The preference statute under the Act and the Code is only a tool to preserve and enforce the bankruptcy priorities. The purpose of the preference section is to assure equality of distribution among creditors who are similarly situated. *Begier v. Krain Outdoor Advertising,* 68 B.R. 326, 331 (Bkrtcy E.D. Pa. 1988).

While not under a taxing authority's trust fund argument, other Circuit Courts have had occasion to address the issue of whether the transfer sought to be avoided by a trustee was in fact a transfer of property of the estate. The key to the analysis by these Courts is whether the debtor exerted any control over the funds subject to avoidance. The Fifth Circuit in *Coral Petroleum, Inc. v. Banque Paribas-London* noted the argument is prevalent in the "ear marking" context. *Coral Petroleum, Inc. v. Banque Paribas-London,* 797 F.2d 1351, 1356 (5th Cir. 1986). Ear marking occurs when one debt is substituted for another. *Id.* The Court concluded that no preference is created in a transaction of this nature, because the debtor has not transferred property of his estate, he still owes the same sum to a creditor, only the identity of the creditor has changed. *Id.* This is common place where a third person makes a loan to the debtor specifically to enable him to satisfy the claim of the designated creditor. The proceeds never become part of the debtor's assets. *Id.* citing to 4 *Collier on Bankruptcy,* Paragraph 547.25 at P. 547-101-2 (15th Edition 1986).

The Court in *Coral Petroleum* concluded that since at no time did the debtor exert any control over the funds whereby it could not independently designate to whom the money would go, no preference could have resulted. *Id. See also Howdeshell of Fort Meyers v. Dunham-Busch, Inc. In re Howdeshell of Fort Meyers,* 55 B.R. 470, 474-5 (Bkrtcy. N.D. Fla. 1985) (where debtor had absolute control over designation of creditors to be

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18. In 1984, Congress adopted an additional amendment to the Bankruptcy Code which further subordinated the priorities given to taxing authorities under 11 U.S.C. §507(a). Congress permitted farmers and fishermen to have a certain limited priority over the taxing authorities for grain and fish storage facilities. Bankruptcy Amendment and Fed. Judgeship Act, Pub. L. 98-353, Section 350(2), 98 Stat. 333, 358.

paid, payment of creditor by debtor's parent company was the property of the estate under 11 U.S.C. §547). In the case at bar, because the debtor had absolute control over the designation of the payment, it was able to prefer the IRS over its other creditors. This is the exact reason the preference statute was enacted.

The Ninth Circuit, in *Danning v. Bozek,* ruled that property belongs to the debtor for the purposes of §547 if its transfer will deprive the bankruptcy estate of something which could otherwise be used to satisfy the claims of creditors. *Danning v. Bozek, (In re Bullion Reserve of North America)*, 836 F.2d 1214, 1217 (9th Cir. 1988); citing to *Coral Petroleum, supra.* The Ninth Circuit supported its position by emphasizing the underlying purpose to the preference section as being to discourage creditors from racing to the Courthouse to dismember the debtor during its slide into bankruptcy and to further the prime policy of sharing in equal distribution to all similarly situated creditors. *Id. See also Valley Bank v. Vance (In re: Vance)*, 721 F.2d 259, 260 (9th Cir. 1983).

Congress and the Court Opinions expressed above, all attempt to achieve that which the Bankruptcy Code, as a whole, desired as a result. Equal distribution to all similarly situated creditors. The Bankruptcy Code does not allow one creditor, even the Internal Revenue Service, to be preferred over another, except where specifically authorized by the express language.

The effect of the Third Circuit's Opinion would be to deny the ability of a bankruptcy trustee to avoid as preferential transfers any pre-petition payments made to the Internal Revenue Service on account of withholding taxes despite the time when the payment was made or the source of the funds. Such a result was not the contemplation of Congress. The conclusion of the Third Circuit which is based on the Dissenting Opinion in *Drabkin* is erroneous because their ruling is founded on language from the House Report before it was modified by the Floor Managers' Compromise Legislation. The holding of the Majority is based on an invisible statute. If Congress truly intended to impose a restriction on the avoidability by a

bankruptcy trustee of pre-petition payments on account of trust fund taxes, it would have expressly provided for such exemption in the statute.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests Your Honorable Court to reverse the ruling of the United States Court of Appeals for the Third Circuit and reaffirm the Order of the United States District Court by the Honorable Donald W. VanArtsdalen affirming the Trial Court ruling by the United States Bankruptcy Court.

Respectfully submitted,

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